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THE DEFENSE PRODUCTION ACT OF 1950¹: VITAL DEFENSE AND EMERGENCY ACQUISITION AUTHORITY FOR 2002

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¹ 50 U.S.C.S. app. § 2061-2171 (LEXIS 2001) (hereinafter, the "DPA").

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Congresswoman Maloney of New York: New York City has been a target repeatedly of major terrorist attacks in recent years. Could you provide an example of how the Defense Production Act (DPA) could be used in the event of ... an attack or major disaster?

Federal Emergency Management Agency General Counsel Michael Brown: The primary example I can think of is, if it was devastating to Manhattan—just destroys all of Manhattan—and we need to make sure, in terms of consequence management, we're going to get food, water, electricity, everything we need to get in to a population of that size and magnitude, where we cannot draw upon ordinary suppliers, ordinary contractual agreements, ordinary arrangements of the Staff, DPA would allow us to do that. That's the kind of event that we think, in terms of a catastrophic event, the DPA may come into play."

"Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth of the Committee on Financial Services, 107th Cong. 9 (June 27, 2001).

I. Introduction

The September 11th attacks should inspire the government acquisition community to carefully study the Defense Production Act of 1950² to ensure that its powerful authorities over the civilian economy are judiciously and deliberately³ used and only very carefully revised.⁴ Generally, the

² *Id.*

³ In 1951, Mr. Alfred L. Scanlan, Assistant Counsel of the Munitions Board, Department of Defense, assessed the DPA's viability as follows:

If the American people persist in the belief that the present hour is one of dire threat to our national security, there should be no doubt that it can do the job for which it was passed. On the other hand, if their will to sacrifice wavers, if they prefer their "butter" to their "guns," or if they lose patience in attempting to follow a course of action which may achieve both, then the DPA will soon be wiped off the books, either by express congressional action, or by its negation in actual practice. The opinion of this writer, either of the last two alternatives would indeed be a fool's choice.

DPA “affords to the President an array of authorities to shape defense preparedness programs and to take appropriate steps to maintain and enhance the defense industrial and technological base.”⁵ More specifically, the DPA provides two distinct types of powers: One is the future-oriented authority to expand and protect the United States industrial base under titles III⁶ and VII.⁷ The other is the title I authority⁸ to “conscript industry”⁹ to ensure the timely availability of products, materials, services, and facilities for defense preparedness and national emergency requirements.¹⁰ Since September 11th, 2002, commentators have focused on the conscription

Alfred L. Scanlan, *The Defense Production Act Extended and Amended*, 27 NOTRE DAME L. REV. 185 at 222 (1951). The DPA’s continued existence is testament to the fact that the American people remain committed to a robust national defense industrial capability. For history and analysis of the DPA shortly after its enactment in 1950, *See generally*, Rodolfo A. Correa, *The Organization for Defense Mobilization*, Vol. 13, No. 1 FED. B. J. 1 (1952) (reviewing governmental structure conducting Korean War mobilization); Harold Levanthal, *The Organization for Defense Mobilization, Part II: Price Controls Under the Defense Production Act, as Amended*, 13 FED B. J. 99 (1952); Peter H. Haskell, *Production Under the Control Materials Plan*, 13 FED. B. J. 16 (1952); Robert H. Winn, *Enforcement of National Production Authority’s Orders and Regulations*, 13 FED. B. J. 64 (1952); Alfred L. Scanlan, *The Defense Production Act of 1950*, 3 RUTGERS L. REV. 518 (1951); Donald S. Frey, *Maintaining Economic Freedom Under the Defense Act of 1950*, 18 U. CHI. L. REV. 218 (1951).

⁴ Carlucci, *Costello Urge Revamp of Defense Production Act*, 52 FED. CONT. REP. 156 (Jul. 17, 1989); David E. Lockwood, *Defense Production Act: Purpose and Scope*, CONG. RES. SERVICE (June 22, 2001) at 1 (noting that DPA revision requests and recommendations have foundered in the past decade because the DPA lacks a defined constituency); Lee M. Zeichner, *Use of the Defense Production Act of 1950 for Critical Infrastructure Protection*, (2001) at <http://www.legalnet.com/Presentations/dpa.pdf>. (last visited Mar. 16, 2002) (recommending evaluation of DPA authorities to cope with criminal, terrorist, and enemy military threats to our national critical infrastructure); THE PRESIDENT’S COMM’N ON CRITICAL INFRASTRUCTURE PROTECTION, MAJOR FEDERAL LEGISLATION, A “LEGAL FOUNDATIONS” STUDY, REP. 6 OF 12 at 2 (1997), at <http://www.ciao.gov/PCCIP/lf06.pdf> (last visited Mar. 19, 2002) (suggesting that the DPA provides legal authority for coping with major disasters or attacks on critical infrastructure).

⁵ 50 U.S.C.S. app. § 2062(a)(5)(LEXIS 2001).

⁶ *Id.* § 2091-2099a.

⁷ *Id.* § 2151-2171.

⁸ *Id.* § 2071-2076.

⁹ Karen Manos, Howrey, Simon, Arnold & White, L.L.P., *Wartime Contracting* (Feb. 1, 2002) (on file with the author), Gov’t. Cont. Year in Rev. Conf. (describing DPA priority contracting authority as “the ability to conscript industry”). The term also applies to allocation authority under the DPA but not to voluntary provisions related to expansion of the industrial base and energy production.

¹⁰ Lockwood *supra* note 4 at 3 and Zeichner *supra* note 4 at 11.

power of title I and its ability to speed up delivery of scarce, critical goods and services¹¹ but it behooves us to survey all DPA authorities to better use its authorities synergistically and more efficiently harness the arsenal of democracy in support of our national security.

Notwithstanding the DPA's apparently vast authority, however, today's DPA is a shadow of its 1950 incarnation which contained seven titles and authorized dramatic dominion over civilian property and controls on the economy. The now extinct titles provided the power to requisition and condemn civilian property under title II,¹² stabilize prices and wages under title IV,¹³ settle labor disputes under title V,¹⁴ and control real estate credit under title VI.¹⁵ These far-reaching powers lapsed in 1953 and Congress never renewed them under the DPA.¹⁶

¹¹ Manos *supra* note 9 at 1 (explaining how the title I priorities system works and discussing related case law); Alison Doyle, Partner, McKenna & Cuneo, L.L.P, *The Defense Production Act Of 1950*, CLIENT ALERT, at http://www.mckennacuneo.com/articles/article_detail.cfm?498 (Oct. 2, 2001) (last visited Mar. 19, 2002) (warning McKenna Cuneo clients to expect government contracts and explains the conditions for mandatory and optional acceptance in addition to mandatory rejection of a government priority order (also known as a "rated" order); Charles Tiefer, Professor, University of Baltimore Law School, *Practical Mind-Set Now Prevails for Government Contracting*, LEGAL TIMES at 36 (Oct. 21, 2001) (discussing how the Sept. 11 attacks changed the tone of government contracting discussion from ideological wrangling to a pragmatic approach).

¹² *Id.* § 2081.

¹³ *Id.* § 2101-2112.

¹⁴ *Id.* § 2121-2137.

¹⁵ *Id.* § 2131.

¹⁶ There is, however, an "urban legend" surrounding the DPA that President Nixon used it to enact wage and price controls in the 1970s. The most prominent promulgator of this legend is Sen. Phil Gramm, a longtime opponent of the DPA. News from the Senate Banking Committee, Senator Phil Gramm, Chairman, *Gramm Outlines Committee Agenda For The 107th Congress*, at <http://banking.senate.gov/prel01/0122prcf.htm>, 22 January 2001. In fact, President Nixon did institute wage and price controls, but his authority was the Economic Stabilization Act of 1970 (ESA) at 12 U.S.C. sec. 1904. Wage and price controls *within* the DPA in 1953 became extinct when congress allowed them to lapse and elected not to reauthorize them. H.R. Rep. No. 516 at 2 (1953).

The author is indebted to Mr. David Cumming, esteemed retired assistant counsel to the Federal Emergency Management Agency, for helping sort out the "urban legend" that President Nixon used the DPA to enact wage and price controls when, in actuality, President Nixon's controls emanated from the ESA of 1970. Telephone Interview, Mr. Cumming, Former Assistant General Counsel, Federal Emergency Management Agency (Mar. 2002) [hereinafter Cumming Interview].

Even though it casts a smaller shadow than it did in 1950, the DPA's authorities are still substantial and still very necessary. Indeed, as recounted in the 2001 reauthorization hearings, "for more than fifty years, the DPA of 1950, as amended, has enabled the President to ensure our nation's defense, civil emergency preparedness, and military readiness by providing "the statutory framework that ... enable[s] the administration to meet future threats to our national security in light of a streamlined armed forces, a consolidated defense industrial base, and a globalized economy."¹⁷ Most significantly, in support of reauthorization of the DPA in June of 2001, officials of the Departments of Defense, Commerce, Energy, and the Federal Emergency Management Agency (FEMA) noted the DPA provides authority for vital national security programs found nowhere else in law.¹⁸

This paper will provide an overview of the DPA with a focus on its historical basis, and its remaining titles, their applications, and the legal doctrines supporting them. Title I, Priorities and Allocations, allows the President to require contracts and orders critical for national defense to take priority over civilian contracts.¹⁹ The Department of Commerce (DoC) implemented title I through the Defense Priorities and Allocations System (DPAS).²⁰ Another significant authority of the DPA is title III, "Expansion of Productive Capacity and Supply."²¹ This title gives the President authority to use financial incentives and loan guarantees to expand the critical defense industrial

¹⁷ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2-7 (2001) (statement of Hon. Kenneth I. Juster, Under Secretary for Export Administration, Department of Commerce).

¹⁸ *Id.* (statements of Hon. David R. Oliver, Jr., Principal Deputy Under Secretary For Acquisition, Technology, and Logistics, Department of Defense; Hon. Kenneth I. Juster, Under Secretary for Export Administration, Department of Commerce; Hon. Eric J. Fygi, Deputy General Counsel, Department of Energy; and Michael D. Brown, General Counsel, Federal Emergency Management Agency).

¹⁹ 50 U.S.C.S. app. § 2071-2178 (LEXIS 2001).

²⁰ Defense Priorities and Allocations System (DPAS). 15 C.F.R. pt. 700 (1998), *available at* <http://www.bxa.doc.gov>.

²¹ 50 U.S.C.S. app. § 2091-2099a.

base.²² Although, various agencies have been delegated responsibility for title III²³ DoD is the only one significantly involved in implementing it.²⁴ Last but not least, title VII provides several disparate implementing authorities and an industrial base preservation authority. The industrial base preservation authority, known as Exon-Florio authority, permits the President to veto U.S. corporate mergers and acquisitions by foreign companies when national security is threatened.²⁵ However, other than noting that it is intended to preserve the industrial base, a thorough analysis of Exon-Florio is beyond the scope of this paper. Additionally, title VII contains a liability immunity provision for entities complying with DPA directives.²⁶ This immunity provision, softens the impact of title I government priority orders on contractors who are forced to set aside or delay work promised to commercial customers and is discussed later.²⁷

By examining the broad scope of the DPA, the acquisition community will be able to synergistically employ its authorities to maximize civilian industry's contribution to national security.

II. Background – Original Enactment and Historical Use

President Harry S. Truman provided the impetus for the DPA on the eve of the Korean Conflict when he asked Congress to provide economic tools to mobilize U.S. productive

²² *Id.*

²³ The president delegated authority for title III to a variety of agencies via Exec. Order No. 12,919, 59 F.R. 29525 (1994).

²⁴ DoD is the only agency with an active title III program. Department of Defense, *Defense Production Act, Title III Program Management*, at <http://www.dtic.mil/dpatitle3/> (describing DoD's implementation of title III) (last visited Mar. 22nd 2002).

²⁵ 50 U.S.C.S. app. § 2170-2170a; *See also* David A. Menard, *The Flexibility of Exon-Florio Amendment and the Expansion of Telecommunications Into the Global Economy*, 31 PUB. CONT. L. J. 313 (2002)(providing an overview of Exon-Florio authority).

²⁶ *Id.* § 2157.

²⁷ *See infra* Part III. C. 3.

capacity.²⁸ The congress offered up the DPA on a limited basis in the sense that it had a three-year lifespan²⁹ but reauthorized it with usually only slight variations every two to three years since.³⁰ Over time, the focus shifted from the 1950s' requirements for raw materials to build tanks and planes to the still prevailing 1990s' requirements for high technology materials, products and services.³¹ Additionally, the DPA has acquired a focus on stemming the decline of certain domestic industries.³²

In its current form, it facilitates, supply and timely delivery of products, materials, and services to military and civilian agencies, as needed, in the interests of national defense.³³ To put the DPA's scope of powers in context, it is instructive to note that even at its zenith in 1950, the DPA was generally viewed as less authority than the executive branch had in World War Two but, nonetheless, one to be exercised sparingly.³⁴

Finally, reflecting Americans' eternal optimism, Congress placed the DPA, a law placing our civilian industry in a war-ready posture, in title 50's appendix, a place where only "laws of a temporary and emergency nature relating to war and national defense" reside.³⁵ Even though the

²⁸ H.R. REP NO. 107-173, at 2 (2001).

²⁹ 50 U.S.C.S. app. § 2166 (listing the DPA's expirations and reauthorizations).

³⁰ *Id.* The most significant changes occurred when titles II, IV, V, and VI were allowed to lapse in 1953. See also *Defense Production Act Amendments of 1953*, H.R. REP. NO. 516, at 2 (1953).

³¹ 50 U.S.C.S. app. § 2062(a) provides that the "vitality of the industrial and *technology* base ... is a foundation of national security" (emphasis added). The "history" section of this code service section notes that Congress added the word "technology" and related changes in the 1992 reauthorization of the DPA. Telephone Interviews with Mr. Rick Meyers, Program Manager, Defense Priorities and Allocation System (DPAS), Bureau of Export Administration, Department of Commerce (Nov. 2001 to Mar. 2002)[hereinafter Meyers Interviews].

³² Lockwood *supra* note 4 at 1

³³ *Id.*

³⁴ Alfred. L. Scanlan, *The Defense Production Act of 1950*, 5 RUTGERS L. REV. 518 (1951) (providing an overview of the DPA following enactment and cautioning government agencies to use it sparingly).

³⁵ 50 U.S.C.A. app. V (WEST 2000).

DPA has resided in this temporary volume for over 50 years, its placement there reminds us that we strive for the day we live in a less threatening world.

A. President Truman's Vision

President Truman demonstrated near-prophetic vision in charging Congress to enact defense production legislation in the midst of Korean Conflict mobilization *and* on the cusp of the Cold War. As if he was able to anticipate the fifty-year stalemate with the Soviet Union and concomitant battle of logisticians gathering war materiel,³⁶ he asked for war production legislation that expressly recognized the importance of the civilian economy to the fight. Specifically, on July 19, 1950, reporting on the "situation in Korea," President Truman proclaimed "The free world has made it clear, through the United Nations, that lawless aggression will be met with force."³⁷ Accordingly, he outlined the government's duty as follows:

A primary duty of the government is *to provide for the common defense*. In fulfilling this responsibility, *the test is not how far we can go without placing strain upon the domestic economy* or without creating inflationary pressures. We must go as far as changing circumstances may require. In the final analysis, there are no limits except our total strength to guide us in our determination to resist aggression and thus to strive for peace.³⁸

Revealingly, President Truman stated the obvious fact that the war effort was more important than the measure of strain on the domestic economy. The fact that stresses on the economy are even considered in this context betrays the fact that the Korean Conflict did not enjoy the support

³⁶ DAVID W. HOGAN, JR., 225 YEARS OF SERVICE, THE U.S. ARMY, 1775-2000 at 30 (2000) (noting substantial material and technology requirements of the Cold War and also mutually beneficial overlap between previously segregated military and civilian industrial requirements), *available at* <http://www.army.mil/cmh-pg/books/225/>.

³⁷ H.R. REP. NO. 2759 (1950), *reprinted in* 1950 U.S.C.C.A.N. 14234 (1950).

³⁸ *Id.* (emphasis added).

that World War Two enjoyed.³⁹ Is this because the U.S. was devoting significant resources and troops to a conflict where neither U.S. safety nor economic interests appeared to be directly threatened? Is it because the awesome power of nuclear weapons gave the U.S. the apparent luxury to fight large-scale wars with less impact on the civilian economy than previously? Probably the truest answer is that ultimately, the President foresaw that in the looming Cold War, there could be no national security without economic viability. Indeed, the President recognized that economic strength would be a linchpin of national security.

Accordingly, President Truman laid the groundwork not just for mobilizing for the Korean War but for civilian industrial support of the deterrence posture used to fight and win the Cold War in saying:

The question remains as to how much of our total economic strength must be shifted from peacetime production to defense purposes in the current situation...I have recommended to the Congress the substantially increased programs which should now be undertaken to resist aggression and further to build up our preparedness. ... These changes take us in the right direction at once. And if the situation should become even more serious later on, *the measures which I now propose for the current situation are also the measures which would make us more ready for further steps.*⁴⁰

Congress answered Truman's call. Acknowledging that while the nation enjoyed unprecedented industrial and economic strength, fears of war-induced shortages at the outset of the Korean Conflict had caused shortages of materials and inflationary economic pressures.⁴¹ Consequently, Congress undertook to allay the fears causing panic buying and, at the same time, to discipline those who would try to take advantage of that fear.⁴² Accordingly, the DPA's

³⁹ Alfred L. Scanlan, *The Defense Production Act Extended and Amended*, 27 NOTRE DAME L. REV. 185, at 221 (1951) (discussing the import of the public perceiving that its DPA induced sacrifice is related to some threat to its security).

⁴⁰ H.R. REP. NO. 2759 at 3621 (emphasis added).

⁴¹ *Id.* at 3623.

⁴² *Id.*

economic controls would reinforce confidence in the business sectors ability to cope with war production and its anti-hoarding provisions would discourage profiteers. In the long-term, however, the DPA would incorporate two critical concepts that continue in the modern DPA; first, to immediately channel needed materials into production for the national defense⁴³ and second, to encourage increased production of certain critical materials needed to support national defense in the future.⁴⁴

The acquisition community should take note that even at the DPA's inception in 1950, Congress acknowledged competition as a key component of our defense industrial might.⁴⁵ Indeed, Congress exhorted government agencies to use restraint in applying the DPA authorities for the sake of the American economy. Specifically, in the "Declaration of Policy" in 1950, Congress stated that the President should endeavor to prevent "undue strains and dislocation upon wages prices, and production or distribution of materials for civilian use, *within the framework, as far as practicable, of the American system of competitive enterprise.*"⁴⁶ Thus, Congress announced its confidence that the fruits of competitive enterprise borne of the American system will, most of the time, produce better products for the national defense than a command and control authoritarian process.

Commentators debated the various implications of this sweeping legislation at first.⁴⁷ However, after congress allowed the more expansive titles to lapse in 1953, very little controversy surrounded the DPA⁴⁸ until Presidents Clinton and G. W. Bush invoked its emergency authorities

⁴³ *Id.*

⁴⁴ *Id.* at 3627.

⁴⁵ H.R. REP. NO. 9176 at 859, 81st Cong. (1950).

⁴⁶ *Id.* (emphasis added).

⁴⁷ See sources cited *supra* note 3.

⁴⁸ In fact, a search of the Index to Legal Periodicals and LEXIS revealed no new law review articles reviewing the entire DPA after 1952.

under title I to ensure delivery of natural gas to California in January and February of 2001.⁴⁹

Pundits said the DPA was intended to be used only for military exigencies rather than various and sundry peacetime emergencies.⁵⁰ Such thinking is shallow in that it fails to recognize that a plethora of different types of emergency situations like energy crises and natural disasters can threaten national security by making us appear weak to our enemies.⁵¹

Overall, there is little doubt but that President Truman and Congress were ahead of their time when they crafted the DPA. Indeed, commentators today continue to trumpet its utility in both responding to and preparing for attacks on our increasingly interrelated critical infrastructure such as computer networks⁵²

B. Gulf War Lapse

A startling DPA story emanates from the Gulf War of 1990 and 1991. The DPA's automatic termination provision and Congress' failure to reauthorize the DPA caused the entire DPA to lapse on September 30th, 1990 – smack in the middle of the Gulf War mobilization.⁵³ This was incorrectly characterized during the 2001 reauthorization hearings as “an unfortunate but brief

⁴⁹ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2-7 (2001) (statement of Hon. Eric J. Fygi, Deputy General Counsel, Department of Energy); CBS News – National, *Natural Gas Crisis...Or War?*, at <http://www.cbsnews.com/stories/2001/02/09/national/main270861.shtml> (last visited Mar. 11, 2002).

⁵⁰ *Id.*

⁵¹ Zeichner *supra* note 4 at 1 (noting the DPA is a “powerful legislative tool for managing critical infrastructure service failures”).

⁵² THE PRESIDENT’S COMM’N ON CRITICAL INFRASTRUCTURE PROTECTION, MAJOR FEDERAL LEGISLATION, A “LEGAL FOUNDATIONS” STUDY, REP. 6 OF 12 at 2(1997), <http://www.ciao.gov/PCCIP/lf06.pdf> (last visited Mar. 19, 2002).

⁵³ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 1 (2001) (statement of Committee Chairman Peter King).

occurrence.”⁵⁴ In fact, the Congress did not get around to reauthorizing the DPA until the Gulf War was over, on August 17th, 1991!⁵⁵ So how did we make it through the Gulf War without the “vital authority”⁵⁶ of the DPA? Two factors combined to make this possible: First, George H. W. Bush was able to extend priority and allocation authority through Executive Order 12742.⁵⁷ Secondly, critical shortages did not severely affect the United States mobilization because the Cold War stockpiles were large enough that no significant tension developed between military and consumer needs.⁵⁸ The lesson taken from this episode should not be that executive authority can easily replace the title I authorities. Instead we should recognize that the country benefited from the short duration of the war and the huge Cold War stockpiles that equipped our fighting forces – and we should not gamble with our national security by going without the DPA authority again.

The above described lapse touches on an important concept justifying continued renewal of the DPA’s priority and allocation authority – that it is most critically required when the public is not quite ready to make voluntary sacrifices for a particular defense need. Our commander in chief must have it to act in our defense even at times when the public will is not quite ready to sacrifice butter for guns in proportion to an arising threat to our national security.⁵⁹ President Truman implied this when he asked for the authority and Congressman Peter King reiterated this prophetically during the 2001 reauthorization hearing when he said of the 1990 lapse, “[f]ortunately, we do not seem to be in that situation now, but geopolitical situations can change

⁵⁴ *Id.*

⁵⁵ 50 U.S.C.S § 2166 (LEXIS 2001); Cumming Interview.

⁵⁶ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 1 (2001) (statement of Mr. Juster).

⁵⁷ Exec. Order No 12,742, 56 Fed. Reg. No. 1079 (Jan. 10, 1991). The title of the order is *National Security Industrial Responsiveness*; Cumming Interview.

⁵⁸ John T. Correll and Colleen A. Nash, *The Industrial Base At War*, AIR FORCE MAGAZINE (Dec. 1991).

⁵⁹ Alfred L. Scanlan, *The Defense Production Act Extended and Amended*, 27 NOTRE DAME L. REV. 185, at 221 (1951).

rather quickly. Also, civil emergencies are particularly hard to predict.”⁶⁰ Obviously, the Al Qaeda attacks of September 11, 2001 on New York and the Pentagon and the ensuing mobilization and war dramatically illustrated Congressman King’s point.

Unfortunately, the Al Qaeda attack was so devastating that there it provided plenty of public support for the war effort⁶¹ at present. Certainly, it would have been preferable if we could have mobilized and struck the enemy without suffering the devastating losses of September 11th, 2001. In any event, we have the DPA now⁶² and are likely in a situation that will justify its continual reauthorization until the world situation changes dramatically.

C. Procurements – 1950 – 2001

The DPA’s contribution to the nation’s security is substantial. Specifically, “[t]he DPA provided vital support to the United States military in every conflict since it was enacted.”⁶³ For example, during the 1950s, the advent of military jet aircraft made expansion of existing titanium facilities at government expense “well nigh mandatory” because of the valuable metal’s importance in the manufacture of high performance jet airframes and jet engines.⁶⁴ At the time, commercial airplanes used piston engines and did not require titanium but military aircraft, then being developed, needed greater quantities than were available in the commercial marketplace. Therefore, it was in the government’s interest to underwrite expansion of the titanium production

⁶⁰ 2001 Reauthorization Hearings at 2 (Mr. King’s statement).

⁶¹ James Dao, *Pentagon Seeking a Large Increase in its Next Budget*, NEW YORK TIMES, Jan. 6, 2002, at 1.

⁶² 50 U.S.C.S. § 2166 (LEXIS 2001) (reauthorizing the DPA until Sept. 30, 2003).

⁶³ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 1 (2001) (statement of Committee Chairman Peter King).

⁶⁴ *Henry A. Carey, Jr., Edwin D. Hicks, J. Pierre Kolisch and Joseph Schulein v. United States*, 326 F. 2d 975; 977 (Ct. of Fed. Claims 1964) (deciding that royalties should be awarded to the patent holder for the titanium manufacturing process).

industry to increase competition among potential government suppliers. The DPA came to the rescue when under title III the government concluded eleven separate purchase agreements with domestic producers of titanium.⁶⁵ These agreements enabled significant expansion of the defense industrial base for this militarily necessary commodity.⁶⁶

Title III was also used to expand domestic manganese mining in the 1950s. Domestic production of this metal⁶⁷ was very limited. It is important to iron and steel production because it has essential sulfur-fixing, deoxidizing, and alloying properties.⁶⁸ Therefore, the government sought to increase domestic production through use of the title III purchase program.⁶⁹ The government was able to expand domestic mining by promising to purchase certain minimum amounts at a price above the market-price for foreign manganese. This was done to ensure a continuous supply in the event foreign suppliers became unreliable in time of conflict.⁷⁰

In addition to title III industrial base expansion projects, title I's priority ordering authority played a valuable role in the 1950s. One interesting case even demonstrated the DPA's utility in prioritizing needs among government agencies. Specifically, DoD used a priority contract to speed up installation of intercontinental ballistic missile silo elevators by a company named Elser.⁷¹ Unfortunately, this priority contract prevented Elser from timely completing work on

⁶⁵ *Id.*

⁶⁶ Department of Defense, *Defense Production Act, Title III Program History*, at <http://www.dtic.mil/dpatitle3/> (noting that title III was used to create a domestic titanium industry "from scratch") (last visited Mar. 22, 2002).

⁶⁷ *Albert W. Himfar v. U.S.*, 355 F.2d 606; 174 Ct. Cl. 209 (1966) (holding that a government agency's improper revocation of a contractor's right to participate in a DPA ore purchase constituted a compensable breach of contract where it caused the contractor to go bankrupt).

⁶⁸ United States Geological Survey, *Manganese Statistical Compendium*, at <http://minerals.usgs.gov/minerals/pubs/commodity/manganese/stat/> (last visited Mar. 19, 2002).

⁶⁹ *Himfar* at 606.

⁷⁰ *Id.*

⁷¹ *Appeal of Elser Elevator Company*, Appeals Case No. 298, VA BCA LEXIS 125 (1960).

elevators in a Department of Veterans' Affairs (VA) building. Consequently, the VA sought to penalize Elser according to a liquidated damages provision of its nonrated contract. Apparently either Elser did not tell the VA that the priority order caused the delay or the VA contracting officer was unaware that the DPA forbids penalties caused by compliance with a priority order.⁷² In any event, the VA Board of Contract Appeals ordered the VA to withdraw the liquidated damages assessment caused by Elser's compliance with the DoD's priority order for missile silo elevators. This case is an anomaly in the sense that a government agency will recognize and respect the DPA's immunity section for delays caused by rated orders without resort to an adversary proceeding.

In the 1960s, the government used title I again to issue rated orders to several chemical manufacturers for the production of Agent Orange defoliant for the Viet Nam War. Unfortunately, this chemical allegedly caused serious health problems to users and became the subject of liability indemnification litigation.⁷³ Ultimately, the DPA immunity provision⁷⁴ was interpreted to provide immunity only "in the event that [a] DPA contractor is forced to breach another contract to fulfill the government's requirements"⁷⁵ rather than automatic indemnification for a product liability claim. This fact would be troubling if not for the existence, outside of the DPA, of the "government contractor defense."⁷⁶ This defense does not provide automatic indemnification for the manufacturer of a defective product provided to the government as sought by the plaintiff

⁷² 50 U.S.C.S. app. § 2157 (LEXIS 2001).

⁷³ Hercules Incorporated, et. al., Petitioners v. United States, 516 U.S. 417 (1996).

⁷⁴ 50 U.S.C.S. app. § 2157.

⁷⁵ Hercules Incorporated, et. al. Petitioners v. United States, 24 F. 3d 188 (1994).

⁷⁶ United States v. Boyle, 487 U.S. 500 at 512 (1988) provides that "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." This current state of the "Government Contractor Defense" is well described in "*The Government Contractor Defense Upheld as Court Rejects OTS Limitation Urged by Plaintiffs*, 44 GOVT. CONTRACTOR at 4 (Feb. 6, 2002).

manufacturers. Rather, it could afford a contractor complying with government specifications the benefits of the government's sovereignty *if* the government's specifications were the cause of harm.⁷⁷

In another case arising out of the Viet Nam War, the government invoked the immunity from breach of contract damages provision of the DPA by informal "jawboning."⁷⁸ Government contractors informally convinced McDonnell Douglas Aircraft Corporation and its suppliers to prioritize military orders for Viet Nam ahead of commercial orders. This delayed production of a large number of passenger jets ordered by Eastern Airlines. Late delivery put McDonnell Douglas in breach of its contract with Eastern which incurred over \$20,000,000 in damages filling its requirements from another source.⁷⁹ In this instance, government's informal invocation of the needs of the war effort were found to effectively invoke the immunity from breach of contract provision of the DPA. Accordingly, Eastern could not obtain damages from McDonnell Douglas incurred as a result of DPA induced delays in production.⁸⁰

In the early 1980s, the United States was held not liable for a contractor that lost a business opportunity because of a DPA induced delivery delay.⁸¹ Specifically, Lockheed California, an aircraft manufacturer, obtained a DPA authorized priority preference for a complicated

⁷⁷ For an excellent overview of the application of the immunity provision of the DPA, *see* source cited *supra* note 9 at 14-7.

⁷⁸ *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F. 2d 957, 964 (5th Cir. 1976) (calling government's informal requests for the aviation industry to give military projects priority ahead of civilian production during the Viet Nam War without formally invoking the DPA "jawboning").

⁷⁹ *Id.* at 965.

⁸⁰ *Id.* at 995 (providing that McDonnell's good faith in complying with the Government's demands for priority and uncontroverted evidence of the entire aviation industry's acceptance of the policy that, as a matter of law that McDonnell was not liable for any delivery delay proximately resulting from the informal procurement program consisting of government "jawboning" suppliers in order to obtain priority for military equipment required for the Viet Nam War).

⁸¹ *Kearney & Trecker Corp. v. U.S.*, 688 F. 2d 780 at 783; 231 Ct. Cl. 571 at 578 (1982) (deciding that the loss of an equipment sale caused by a DPA priority did not constitute a compensable government taking under the 5th Amendment to the U.S. Constitution).

manufacturing device built by Kearney and Trecker Corporation. The device, a "moduline," took two-years from to build. Without the priority contracting authority, Lockheed would have had to wait two years from order to delivery. Using its government authorized priority, Lockheed bought an almost-complete moduline previously ordered by Rolls Royce Corporation for a commercial application. Faced with an almost two-year additional wait for its moduline, Rolls Royce cancelled its order with Kearney and Trecker. Kearney and Trecker then sued the United States alleging that the priority rating perpetrated a compensable taking under the Constitution. The Court of Claims denied the taking claim holding that the DPA caused only "the mere frustration of a contract resulting from the government's exercise of its power of eminent domain," rather than a "taking" for which compensation must be awarded.⁸² This landmark case defined the legal status of priority contracting induced hardships in the government's favor.

In the late 1980's, title I came to the government's rescue again when an explosion at one of the nation's two ammonium perchlorate plants jeopardized the government's access to this indispensable rocket fuel component. The government used Title I's allocation authority to great effect to divide up the limited remaining supply of ammonium perchlorate among commercial and government consumers until additional suppliers could start production.⁸³

During the Gulf War, despite the fact that it was only authorized by the President's executive authority,⁸⁴ priority rating authority was used to great effect to procure items as diverse as

⁸² *Id.* at 783 *interpreting* *Omnia Commercial Co. v. United States*, 261 U.S. 502 at 510-511(1923).

⁸³ *Defense Production Act: Hearing Before the Senate Banking Committee*, 100th Congr. at 7 (1989), LEXIS, Nexis Library, Congressional Universe (comments of Robert Costello, Former Undersecretary of Defense); Steven R. Linke, *Managing Crises in the Defense Industry: The Pepcon and Avtex Cases*, McNair Papers, No. 9, Institute for National and Strategic Studies, (First Printing, July, 1990; Second Printing, Nov. 1996) (describing the cumbersome presidential, interagency, and congressional coordination process required to use the DPA to relieve critical shortages of rocket fuel and rocket engine production in the late 1980s) at <http://www.ndu.edu/inss/macnair/mcnair09/mcnair09.pdf> (last visited Mar. 19, 2002).

⁸⁴ *See infra* Part II. B.

computers and communication equipment, satellite-based mapping systems and materials to help protect troops against chemical weapons.⁸⁵

In the last decade, title I's authority as implemented in the DoC's DPAS served to set priorities for scarce resource requirements among military departments and to timely provide American defense materiel to our allies. For example, the DoD used the DPA as authority to evaluate and modify production resource shortfalls and delivery conflicts of transparent bubble canopies for F-22, F-18A/B/C/D, and F-18E/F aircraft. Additionally, when German and Belgian Air Forces had trouble obtaining global positioning system navigational processors from a manufacturer in a timely manner adversely impacting pilot training, the DoD and DoC stepped in and applied DPAS priority authority to enable the contracts to be filled in advance of lesser priority U.S. orders. Finally, when the United Kingdom (U.K.) experienced delays in receiving critical identification friend or foe transponders for U.K. WAH-64 Apache helicopters, DoD and DoC authorized use of a priority rating to permit the manufacturer to ship the transponders much sooner than would have been otherwise possible.⁸⁶

Since 1995, the government used the DPAS to support U.S. and allied peacetime and wartime defense requirements on more than 100 occasions.⁸⁷ Sixty eight percent of all cases supported wartime requirements – fifty percent Bosnia and eighteen percent Kosovo.⁸⁸ Procurements assisted by the DPAS included communications equipment, Joint Direct Attack Munitions (JDAMs), and computer equipment for North Atlantic Treaty Organization (NATO) command and control infrastructure. Thirty seven percent of the cases supported U.S. defense

⁸⁵ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2 (2001) (statement of Committee Chairman Peter King).

⁸⁶ *Id.* at 14 (statement of Hon. David Oliver).

⁸⁷ *Id.*

⁸⁸ *Id.*

requirements, forty seven percent supported the NATO, nine percent the U.K., three percent supported Canada, and two cases for Israel, and one case each for Japan and Germany.⁸⁹

Undoubtedly, the government used DPA authority to maintain our defense posture through the Cold War and every significant military operation since its inception. Through continuous judicious use of title I, urgent needs were consistently met. Through carefully planned use of title III, we addressed long-term materiel deficiencies and developed fledgling domestic capabilities. Overall, the DPA has been a critical linchpin in our ability to respond to threats to our security including those where our allies are part of the web of security protecting freedom worldwide.

D. 2001 Reauthorization Rationale

In hearings during the Summer of 2001, Congress considered whether to reauthorize the DPA.⁹⁰ Ultimately, noting that the industrial and technology base of the United States is a foundation of national security, Congress provided the President a vast array of authorities to shape defense preparedness.⁹¹ The authorities expressly transcend peace, crisis, and war because “in peacetime, the health of the industrial and technological base contributes to the superiority of United States equipment, and in time of crisis, a healthy industrial base will be able to effectively meet the demands of an emergency.”⁹²

Finally, Congress justified reauthorization of the DPA as follows: Continuing international problems including reliance on imports and production lead times requires development of preparedness programs, domestic defense industrial base improvement, provisions for graduated

⁸⁹ *Id.* at 14-15.

⁹⁰ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2 (2001).

⁹¹ 50 U.S.C.S. app. § 2062(a)(1) (LEXIS 2001).

⁹² *Id.* § 2062(a)(2-3).

response to threats, expansion of domestic production capacity, and some diversion of materials and facilities from civilian to military and related purposes.⁹³ Thus, the threats requiring this standby authority in President Truman's time continue to this day.

III. The DPA In 2002 -- Applying its "Array of Authorities"⁹⁴

Today's DPA authority retains two basic thrusts, command and control over specific items and services under title I and industrial base expansion and maintenance measures under title III and VII, respectively. Voluntary industrial base expansion authorities reside in title III's economic incentives.⁹⁵ Involuntary defensive measures reside in title VII's Exon-Florio prohibition on acquisitions of critical U.S. industries that may threaten national security.⁹⁶

Despite the inference given by the "array of authorities" phrase in the DPA's "Declaration of Policy,"⁹⁷ the depth and breadth of its potential impact is scaled back significantly since inception in 1950 version. As mentioned previously, most of the reduction occurred in 1953 when four of the original seven titles were rescinded. The extinct powers to requisition and condemn civilian property under title II,⁹⁸ stabilize prices and wages under title IV,⁹⁹ settle labor disputes under title V,¹⁰⁰ and control real estate credit under title VI¹⁰¹ gave the 1950 incarnation of the DPA a direct

⁹³ *Id.* § 2062(a)(4)(A-E).

⁹⁴ *Id.* § 2062(a)(5).

⁹⁵ *Id.* § 2091-2099.

⁹⁶ *See* sources cited *supra* note 25.

⁹⁷ 50 U.S.C.S. app. § 2062(a)(5).

⁹⁸ *Id.* § 2081.

⁹⁹ *Id.* § 2101-2112.

¹⁰⁰ *Id.* § 2121-2137.

¹⁰¹ *Id.* § 2131.

reach into the life of almost every citizen and probably made the DPA too likely to intrude unnecessarily into the civilian marketplace where it was hoped that market forces could provide for defense needs without intervention. The remaining power to improve the industrial base's defense capabilities through judicious use of priorities, allocations, and incentives seem more in accord with the DPA's original mandate to provide for national security needs "within the framework, as much as possible, [of] the American system of competitive enterprise" – a minimalist approach to federal intervention.¹⁰²

The most controversial DPA authority is the title I authorized DPAS that grants federal agencies, contractors, and subcontractors the legal power to compel private companies to place certain orders ahead of others. The goods or services are paid for at ordinary market-price rates but the DPAS does not compensate parties for inconvenience or delay suffered when a commercial order is delayed because of a priority government order.¹⁰³ How does this work? What's the precise legal authority for this? How have government agencies systematized and executed this authority? Does it work well? Have unforeseen legal issues historically cropped up after the goods or services are delivered? What are they? The next subsection will undertake to answer these questions.

The title III authorizes the President to use various financial incentives to "develop, maintain, modernize, and expand the productive capacities of domestic sources for critical components, critical technology items, and industrial resources essential for the execution of the national security strategy of the United States."¹⁰⁴ However, he may only use the authority in cases where domestic sources would best serve national security but are not available.¹⁰⁵ The President's

¹⁰² H.R. REP. NO. 9176 at 859, 81st Cong. (1950).

¹⁰³ See generally 15 C.F.R. pt. 700 (1998).

¹⁰⁴ 50 U.S.C.S. app. § 2077(a).

¹⁰⁵ *Id.* § 2091-2099.

responsibilities in title III are theoretically carried out via a complex system of interagency checks and balances via delegations and assignments of responsibility in Executive Order 12,919.¹⁰⁶ However, the DoD controls the purse strings, and effectively, the program because it is the fund manager for the title III account.¹⁰⁷ Is this the right construct to deal with the current attacks on civilian targets in the United States? It is hard to say but the fact that there is significant congressional oversight of the title III program ensures that the issue will receive a high degree of scrutiny.¹⁰⁸

Finally, title VII gives the President the power under the Exon-Florio Amendment to “suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses if such action threatens national security.”¹⁰⁹ Additionally, entities controlled by foreign governments can be likewise prohibited from acquiring DoD contractors engaged in significant defense projects.¹¹⁰ As noted earlier, a thorough analysis of this authority is beyond the scope of this paper. Nevertheless, in keeping with Truman and Congress’ original vision for the DPA, it should be used very sparingly because it intrudes directly into the civilian economy.

A. Title I – Priority in Contracts and Orders¹¹¹

¹⁰⁶ Exec. Order No. 12,919, 59 F.R. 29525 (1994).

¹⁰⁷ *Id.* § 309. The Secretary of Defense is designated the Defense Production Act Fund Manager, in accordance with § 304(f) of the Act, and shall carry out the duties specified in that section, in consultation with the agency heads having approved Title III projects and appropriated Title III funds.

¹⁰⁸ According to the official DoD website at Department of Defense, *Defense Production Act, Title III History*, at <http://www.dtic.mil/dpatitle3/>, (last visited Mar. 22, 2002) the 1950 title III program had almost unlimited authorities to encourage private investment in materials production and supply but today's program is subject to a significant restrictions to ensure that government action is needed and that title III authorities are the best means to meet the need. Significant oversight comes from the fact that proposed title III actions are subject to prior review by Congress.

¹⁰⁹ See sources cited *supra* note 25.

¹¹⁰ 50 U.S.C.S. app. § 2171.

¹¹¹ *Id.*

Generally, title I authorizes the priority of certain government contracts ahead of other contracts and allocation of designated scarce critical materials.¹¹² Additionally, it forbids hoarding of designated materials¹¹³ and contains a criminal sanction provision.¹¹⁴ Title I also contains provisions for strengthening domestic capability in support of title III¹¹⁵ and, finally, a “strong preference for small business concerns which are subcontractors or suppliers.”¹¹⁶

The “Priority in Contracts and Orders” section¹¹⁷ gives the President the aforementioned power to require priority performance of designated contracts. It is limited to contracts other than employment which he deems necessary to promote the national defense. Additionally, as this authority is interpreted by the DoC, a contractor performing a priority order may be required to issue a priority order to its subcontractors.¹¹⁸ This gives the prime contractor the “extremely useful” ability to flow down his own priority privilege and its associated immunity against breach of contract claims caused by a priority order to those subcontractors performing work to fill the prime’s priority government contract.¹¹⁹ In addition to the priority power, this section provides the President authority to allocate materials, services, and facilities in such a manner, upon such conditions, and to such extent he deems necessary or appropriate to the national defense.¹²⁰ Finally, the DPA prohibits recipients of title I contracts or orders from discriminating against the

¹¹² *Id.*

¹¹³ *Id.* § 2072.

¹¹⁴ *Id.* § 2073.

¹¹⁵ *Id.* § 2077.

¹¹⁶ *Id.* § 2078.

¹¹⁷ *Id.* § 2071.

¹¹⁸ 15 C.F.R. pt. 700 (1998).

¹¹⁹ Presentation by John T. Jones, Jr. to the 2001 Contract Law Symposium, 6 Dec 01, The Army Judge Advocate General’s School (TJAGSA), Charlottesville, Virginia. Mr. Jones agreed to waive the TJAGSA non-attribution policy to permit the author to present his ideas in this paper.

¹²⁰ 50 U.S.C.S. app. § 2071(a).

government by charging a higher price than they would if the order were not compulsory, or price gouging.¹²¹

1. Priority and Allocations Authority Delegation

By far, the most prominent feature of today's DPA in the war on terrorism is title I's contract priority authority¹²² that authorizes the President to require private companies to perform contracts for goods, services, or facilities¹²³ under the government's terms¹²⁴ to the extent he deems "necessary to promote the national defense."¹²⁵ Because it authorizes the government to *require* businesses to accept and provide priority to government contracts, it has garnered significantly more negative attention than the more benign authority to take steps to enhance the industrial base provided by title III.¹²⁶ Additionally, the title I authority has more teeth than the title III authority. This is because the DoC is delegated specific authority and responsibility to administer the DPAS, through Executive Order 12919¹²⁷ and because non-compliance risks criminal sanctions.¹²⁸

¹²¹ *Id.* § 2157. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this act ... or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

¹²² See sources cited *supra* notes 9, 11, and accompanying text.

¹²³ 50 U.S.C.S. app. § 2062(a)(5).

¹²⁴ *Id.* § 2071(a).

¹²⁵ *Id.* § 2071(a)(2).

¹²⁶ See sources cited *supra* notes 9, 11, and accompanying text.

¹²⁷ Exec. Order No. 12,919, 59 F.R. 29525 (1994). See also National Defense Industrial Resources Preparedness and Defense Priorities and Allocations System, 15 C.F.R. pt. 700 (1998), Revised Edition. Available at <http://www.bxa.doc.gov> (last visited Feb. 9, 2002).

¹²⁸ 50 U.S.C.S. app. § 2073.

As mentioned previously, the President has delegated authority for making these findings and implementing the DPA to various agencies of the government via Executive Order 12919.¹²⁹ Under the order, the National Security Council is designated as the “principal forum for consideration and resolution of national security resource preparedness policy.”¹³⁰ Additionally, FEMA Director is appointed as an advisor to the National Security Council on the issue of national security policy and is further directed to coordinate plans and programs incident to authorities and functions of the DPA.¹³¹

There is a surprising twist in the President’s delegations. Generally, the President delegated priority authority to agencies according to their area of responsibility. For example, the Secretary of Agriculture is responsible for food resources, the Secretary of Energy for energy, the Secretary of Health and Human Services for health resources, and the Secretary of Transportation for civil transportation.¹³² The surprising part is that the DoD is responsible for priority contracts with respect to *water* resources¹³³ while the DoC has ultimate dominion *all other* materials, services and facilities.¹³⁴ There is nothing in the Executive Order that explains why DoC has dominion over all materials including defense materials while DoD has complete authority over water. However, it stands to reason that it is because the Army Corps of Engineers, under DoD, is best positioned among federal agencies to make informed decisions about water¹³⁵ while DoC, of all

¹²⁹ Exec. Order No. 12,919.

¹³⁰ *Id.* § 104.

¹³¹ *Id.*

¹³² *Id.* § 201(a)(1)-(4).

¹³³ *Id.* § 201(a)(5).

¹³⁴ *Id.* § 102(a)(6).

¹³⁵ The Army Corps of Engineers Mission Statement lists as a goal “Creating synergy between water resources development and environment.” Army Corps of Engineers Website at <http://www.hq.usace.army.mil/cepa/vision/vision.htm> (last visited Mar. 20, 2002).

the departments, is best situated to balance the priority of defense related needs of DoD against federal and commercial requirements.¹³⁶

The lion's share of the bureaucratic work of the DPA is delegated to the DoC. Accordingly, the DoC implemented the DPAS in consultation with relevant agencies. The DoC redelegated authority for rating all contracts for materials, services, and facilities needed in support of designated programs to the agency with determination authority over the program at issue. For example, the DoD has authority to issue rated order regarding combat aircraft and FEMA can make orders for emergency supplies.¹³⁷

The energy priority process also has an interesting combination of delegations. Specifically, the DoC shares a part of the energy related decision process with the Department of Energy (DoE). The DoE must determine when a material, service, or facility is "critical and essential" and the DoC must make determine when it is "scarce"¹³⁸ Thus is laid out the "energy kabuki dance"¹³⁹ where the DoE and DoC must agree on the approach before the government may allocate or require contract priority for energy.¹⁴⁰ Of course, since these are the President's authorities, he could always do as Presidents Clinton and G. W. Bush did to relieve California's 2001 energy

¹³⁶ Meyers Interviews.

¹³⁷ 15 C.F.R. pt. 700 at A-35.

¹³⁸ Exec. Order No. 12,919 § 101(c). According to 15 C.F.R. pt. 700 at A-18 (1998), "scarcity" implies an unusual difficulty in obtaining the material, equipment, or services in a time frame consistent with the timely completion of the energy project. Among the factors to be used in making the scarcity finding will be the following: (i) Value and volume of material or equipment shipments; (ii) Consumption of material and equipment; (iii) Volume and market trends of imports and exports; (iv) Domestic and foreign sources of supply; (v) Normal levels of inventories; (vi) Rates of capacity utilization; (vii) Volume of new orders; and (viii) Lead times for new orders.

¹³⁹ Kabuki is a traditional Japanese popular drama performed with highly stylized singing and dancing. Merriam Webster's Collegiate Dictionary (2002), at <http://www.m-w.com/cgi-bin/dictionary>.

¹⁴⁰ 50 U.S.C.S. app. § 2071(c) as delegated by Exec. Order No. 12,919 § 202, 59 F.R. 29525 (1994).

crisis and make the determinations personally.¹⁴¹ This is actually true of all of the delegated authorities but, fortunately, the DPAS's delegation of authority to responsible agencies by way of preapproved program designations saves agencies from the multi-agency findings kabuki dance in most cases.¹⁴²

2. What is a DPAS "Rated Order?"

A DPAS "rated order" is an order placed under the authority of DoC's DPAS program to obtain preferential acceptance and performance of contracts or orders supporting approved national defense and energy programs.¹⁴³ The DPAS's goals are: (1) to assure the "timely availability" of industrial resources to meet "current national defense and emergency preparedness program requirements;" and (2) to provide an "operating system" to support rapid industrial response in a national emergency.¹⁴⁴

More specifically, a rated order is a prime contract, subcontract, or purchase order issued in support of an approved national defense or energy program that, under the DPAS, requires preferential treatment over "unrated" orders. An "unrated" order is a commercial order or an unrated government order.¹⁴⁵ To qualify as a "rated" order, an order must comply with specific DPAS requirements. Namely, it must have (1) a priority rating derived from the DPAS regulation, (2) a required delivery date(s), (3) a signature or name of a person authorized to issue the order, and (4) a statement that "This is a rated order certified for national defense use, and you are

¹⁴¹ *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2-7 at 32 (2001) (statement of Hon. Eric J. Fygi, Deputy General Counsel, Department of Energy)(27 June 2001).

¹⁴² Meyers Interviews.

¹⁴³ 15 C.F.R pt. 700 at iii. (1998).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* pt. 700 at B-4.

required to follow all the provisions of the DPAS regulation (15 C.F.R. 700)."¹⁴⁶ More specific guidance is contained in the DPAS regulation.

The DPAS regulation contains a listing of programs that are preapproved for priority performance.¹⁴⁷ Because they are preapproved, the agencies listed in the regulation may issue rated orders for requirements of these programs without consulting with DoC. This listing indicates the preapproved programs and the agencies authorized to issue rated contracts in support of those programs. For example, DoD may issue rated orders for aircraft, missiles, ships, tanks, weapons, ammunition, electronic and communications equipment, military building supplies, production equipment (both government owned and contractor owned), combat rations, construction, maintenance, repair, and operating supplies.¹⁴⁸ The DoC reserves the authority to issue rated orders on behalf of foreign military and atomic energy programs. Additionally, the General Services Administration may issue rated orders for federal supply items, and FEMA for emergency preparedness activities.¹⁴⁹

For assistance with the DPAS program, the DoC offers "Special Priorities Assistance."¹⁵⁰ This assistance is available to resolve requirements that are not on the preapproved list, to help resolve conflicting priorities, or if a vendor needs assistance in complying with a rated requirement.¹⁵¹

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at A-35-37.

¹⁴⁸ *Id.* at A-35.

¹⁴⁹ *Id.* at A-37.

¹⁵⁰ *Id.* pt. 700.5 and B-16.

¹⁵¹ *Id.*

There are two levels of priority available to expedite delivery of required items and services: "DO" and "DX." DO rated orders have equal priority with each other and take preference over all commercial orders. DX rated orders take preference over DO and commercial orders.¹⁵² This does not mean, however, that a contractor has to drop all work to fill the rated order immediately. Rather, it means that the contractor must meet the designated delivery date and prioritize the rated order ahead of commercial or lesser priority rated order(s) if necessary to deliver the rated order on the delivery date.¹⁵³ For this, the contractor receives his usual price for the rated order and is immunized against breach damages that might flow from delay in filling a preexisting commercial contract.¹⁵⁴

In the event that different rated orders of either type pose a delivery conflict that can not be resolved within or between agencies and the contractor, Special Priorities Assistance should be sought from the DoC.¹⁵⁵ Ultimately, if two agencies can not come to a satisfactory resolution of competing priorities with DoC assistance, the decision would have to be made by the President but this has never occurred.¹⁵⁶

Contractors filling rated orders frequently must ensure that rated orders are issued to their big-ticket subcontractors to ensure meeting delivery requirements under the rule of "mandatory extension."¹⁵⁷ The rule also applies from subcontractor to subcontractor.¹⁵⁸ However, it primarily

¹⁵² *Id.* pt. 700.3(b).

¹⁵³ *Id.* pt. 700.3(c) Rated orders "must be scheduled to the extent possible to ensure delivery by the requested date."

¹⁵⁴ *Id.* pt. 700.90; 50 U.S.C.S. app. § 2157.

¹⁵⁵ *Id.* at pt. 700.11 and pt. 700.14(c)(2). pt. 700.50 – 700.54 provides an explanation of the types of assistance available through the Special Priorities Assistance Program.

¹⁵⁶ Meyers Interviews. He noted that the DoC actively seeks alternative sources and works carefully with agencies who have competing requirements. Accordingly, as of the Mar. 20, 2002, the President never had to arbitrate a dispute among agencies.

¹⁵⁷ 15 C.F.R. pt. 700.17.

applies to requirements priced over \$100,000¹⁵⁹ for production or construction materials, component parts, services, required packaging materials, maintenance, and operating supplies. It also applies to rated orders below the threshold when necessary to meet a priority order delivery schedule.

There are exceptions under which parties can refuse to accept a rated order. Specifically, orders that "must" be rejected include those that can not be filled on the requested date, but the supplier must inform the requester when the order could be filled.¹⁶⁰ Additionally, suppliers "may" reject rated orders when agency placing the order is "unwilling or unable to meet regularly established terms of sale or payment."¹⁶¹ This means that the agency placing the order must be willing and able to pay the contractor the price the contractor ordinarily charges for the same or similar service.¹⁶² Other orders that may be rejected include those for items not supplied or services not performed; orders for items produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order;¹⁶³ and orders items or services that the person placing the order produces or performs. Finally, a contractor is not required to fill an order for a requirement if doing so would violate a law or order of the DoC.¹⁶⁴

¹⁵⁸ *Id.* pt. 700.17(a).

¹⁵⁹ Currently, the Simplified Acquisition Threshold is \$100,000, therefore, in accordance with the DPAS regulation, rated orders for requirements smaller than \$100,000 need not be passed on as rated orders to suppliers providing items costing less than that amount unless a rating is required to obtain timely delivery. GENERAL SERVS. ADMIN. ET. AL. FEDERAL ACQUISITION REG. 2.101 (2001) [hereinafter FAR] *available at* <http://farsite.hill.af.mil/VFFARA.HTM> (last visited Mar. 22, 2002).

¹⁶⁰ *Id.* pt. 700.13.

¹⁶¹ *Id.* pt. 700.13(c)(1).

¹⁶² Meyers Interviews.

¹⁶³ 15 C.F.R pt. 700.13(c)(3).

¹⁶⁴ *Id.* pt. 700.13(c)(5).

A party receiving a rated order must expressly accept or reject it within fifteen working days after receipt of a DO rated order or ten working days after receipt of a DX rated order. Likewise, if a condition will delay a previously accepted rated order, the orderer must be notified.¹⁶⁵

*3. Minimizing Use of the Allocation Authority*¹⁶⁶

If the industrial base adequately supplies emergency needs, we will not have to allocate resources. This is a desirable outcome because the word allocate conjures up undesirable images of "rationing" and material sacrifice. However, if necessary, the President still has authority to allocate critical scarce resources¹⁶⁷ to industries to optimize production of defense materials¹⁶⁸ and prohibit profiteers from hoarding the same resources.¹⁶⁹ Fortunately, it is seldom done. Currently, it only applies to metalworking machines¹⁷⁰ and recently it was used to address a short-lived crisis involving ammonium perchlorate rocket propellant production.¹⁷¹ To continue this pattern of success, the strength of the industrial base and the application of title III production expansion programs should be monitored closely to continue our history of infrequent use of this authority. The Air Force has taken a synergistic approach along these lines by managing title I

¹⁶⁵ *Id.* pt. 700.13(d).

¹⁶⁶ *Id.* at A-20. Allocation rules were generally used in World War II and in the Korean War to fill defense requirements that could not otherwise be met without causing economic dislocation and hardship.

¹⁶⁷ 50 U.S.C.S. app. § 2071(a)(2) (LEXIS 2001).

¹⁶⁸ S. REP. NO. 104-134, at 1 (1995), *reprinted in* 1995 U.S.C.C.A.N. 639, 640.

¹⁶⁹ 50 U.S.C.S. app. § 2072.

¹⁷⁰ *Id.* pt. 700.30, 700.31.

¹⁷¹ *See Linke supra* note 83 at 4.

and title III programs jointly in the Air Force Research Laboratory Manufacturing Technology Division.¹⁷²

It is important to note that allocation authority is restrained by the requirement that the government make two specific findings. First, the material must be scarce, critical, and essential to the national defense, and, second, the requirements of the national defense cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.¹⁷³ This halter on the allocation authority is significant and harkens back to the 1950 rationale that no DPA authority should be inflicted on the civilian economy unless absolutely necessary.¹⁷⁴

In sum, infrequent use of allocation authority indicates that our industrial base is adequately providing for defense and emergency needs. To the extent that we are able to predict shortages in a material or service that will require allocation, title III authorities, which are thoroughly discussed in the next section, empower us to do something about it. We should use continue to study the industrial base for all defense requirements the way the Air Force does in its integrated execution of title I and III programs. Additionally, we should adopt this integrated approach to analyzing industrial base issues to respond to homeland security needs like water supply, power supply, and computer infrastructure integrity.¹⁷⁵ In the end, proper application of title III authority to expand the industrial base where we can predict emergency and war requirements will mean that we are even less likely to have to allocate scarce resources.

4. Implementation

¹⁷² Air Force Research Laboratory, Materials and Manufacturing Directorate. *See* <http://www.ml.af.mil/divisions/mlm/mlm.html> (last visited Mar. 19, 2002).

¹⁷³ 50 U.S.C.S. app. § 2071(b).

¹⁷⁴ *See supra* pp. 12-13.

¹⁷⁵ *See* LEGAL FOUNDATIONS STUDY at 2 *supra* note 4.

Each agency implements the DPAS according several layers of rules delegating authorities. Additionally, each agency tailors DPA policy objectives to its own needs. To start with, the Federal Acquisition Regulation¹⁷⁶ parrots key elements and delegations of the DPAS regulation.¹⁷⁷ For the DoD, there is a Department of Defense Directive on the DPAS which establishes policies and delegates authorities on the DPA.¹⁷⁸ Using the Air Force as an example, there are further delegations through its own policies. The Air Force combines title I and III guidance in a unified Policy Directive.¹⁷⁹ This directive designates Air Force policy to “comprehend the capabilities and limitations of essential industrial sectors, both private and governmental” in order to identify and prepare solutions for supply shortfalls.¹⁸⁰ Separate from the policy directive, there is a small reference to the DPAS in the Air Force Federal Acquisition Regulation¹⁸¹ that refers acquisition personnel to the Air Force Instruction relevant to the DPAS.¹⁸² The Air Force Instruction delegates responsibility for the Air Force DPAS program to the Air Force Materiel Command and describes how the Air Force will determine rateable requirements, report violations, and carry out other DPAS functions. In sum, the Air Force’s program is delegated to its acquisition command and is tailored to address its individual requirements. It takes a synergistic approach to using title III and I authorities to manage immediate shortfalls and at the same time understand why they occur. This approach puts the agency in the drivers seat with control of information it needs to carry out its mission. Accordingly, the Air Force is empowered to effectively catalyze the specific industrial base

¹⁷⁶ FAR 11.602

¹⁷⁷ 15 C.F.R. pt. 700.

¹⁷⁸ U.S. DEP’T OF DEFENSE, DIR. 4400.1, DEFENSE PRODUCTION ACT PROGRAMS (Oct 12, 2001).

¹⁷⁹ U.S. DEPT. OF AIR FORCE, POLICY DIRECTIVE 63-6, ACQUISITION, INDUSTRIAL BASE PLANNING (Apr. 22, 1993).

¹⁸⁰ *Id.* at 1.

¹⁸¹ U.S. DEP’T OF THE AIR FORCE, AIR FORCE FEDERAL ACQUISITION REGULATION SUPP. 5311.603 (May 1, 1996) [hereinafter AFFARS].

¹⁸² U.S. DEPT. OF AIR FORCE, INSTR. 63-602 ACQUISITION, DEFENSE PRODUCTION ACT TITLE I--DEFENSE PRIORITIES AND ALLOCATIONS SYSTEM (March 28, 1994).

elements that it depends on. Indeed, this is in keeping with the spirit and intent of the authors of the DPA!

B. Expansion and Maintenance of the Industrial Base -- Titles III and VII

Titles III and VII generally authorize efforts under the DPA to get out in front of supply challenges for critical requirements, seemingly fulfilling the DPA's initial policy mandate to minimize the intrusion into the civilian economy. Title III authorizes the President to use financial incentives such as loan guarantees,¹⁸³ loans,¹⁸⁴ and grants to encourage contractors to establish or expand activities to provide increased industrial capacity for defense needs.¹⁸⁵ It is described as the "primary legislation designed to ensure industrial resources and critical technology items essential for national defense are available when needed."¹⁸⁶ Its primary objective "is to work with U.S. industry to strengthen our national defense posture by creating or maintaining affordable and economically viable production capabilities of items essential to our national security through the use of financial incentives to stimulate private investment in relevant industry."¹⁸⁷

Technically, the President delegated the title III mission to the National Security Council and the heads of "every Federal department and agency assigned functions" under the DPA.¹⁸⁸ This means that the heads of FEMA, Agriculture, DoE, Health and Human Services, Transportation, DoD, and DoC each theoretically have coequal responsibility in carrying it out. However, the

¹⁸³ 50 U.S.C.S. app. § 2091 (LEXIS 2001) (authorizing loan guarantees).

¹⁸⁴ *Id.* § 2092 (authorizing loans to private business enterprises).

¹⁸⁵ *Id.* § 2093 (authorizing purchase of raw materials and installation of equipment).

¹⁸⁶ *Annual Industrial Capabilities Report to Congress*, Department of Defense at 77 (2001) available at http://www.acq.osd.mil/ip/ip_products.html (last visited Mar. 19, 2002).

¹⁸⁷ *Reauth. Hearing*, 107th Cong. at 15 (2001) (statements of Hon. David R. Oliver, Jr., Principal Deputy Under Secretary For Acquisition, Technology, and Logistics, Department of Defense).

¹⁸⁸ Exec. Order No. 12,919 § 104, 59 F.R. 29525 (1994).

FEMA director is specifically designated as the “advisor to the National Security Council on issues of national security resource preparedness.”¹⁸⁹ Therefore, the focal point for DPA advising on title III, and the whole of DPA policy is the director of FEMA but responsibility for execution of title III is shared by all agencies designated. Notwithstanding FEMA’s central advisory role, authority over the DPA fund used to pay for title III programs is assigned to DoD.¹⁹⁰ So far, this approach appears to have been successful as evidenced by the succession of industrial base expansion success stories played out since the 1950s.¹⁹¹ Expanded titanium production in the 1950s and ongoing programs to expand production of silicon on insulator wafers, laser protective eyewear, and microwave power tubes are several examples.¹⁹²

However, these projects are mostly focused on advanced weaponry that enables us to reach out and touch combatant armies that threatened us in the past. Now that we have been exposed to dramatically damaging terrorist attacks on civilian targets on our own soil, it may be time to consider whether title III should be directed at technologies to protect the our civilian infrastructure. If title III is to be used to encourage the civilian sector to fortify its buildings, energy supplies, computer networks, and basic safety in accordance with the broad mandate to maintain the industrial base, money will have to be allocated for these projects. Past experience shows that carefully targeted title III project can dramatically enhance industry’s responsiveness to national security needs so we should strongly consider following up on these successes to enhance security in accordance with the new threats.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* § 309.

¹⁹¹ *Annual Industrial Capabilities Report to Congress*, Department of Defense at 77 (2001) available at http://www.acq.osd.mil/ip/ip_products.html (last visited Mar. 19, 2002) (noting that the DPA is the primary legislation designed to ensure that the industrial resources and critical technology items essential for national defense are available when needed).

¹⁹² *Id.*, See *supra* note 18.

Title VII is generally comprised of various implementing provisions¹⁹³ including the previously referenced “Exon-Florio” authority.¹⁹⁴ As noted earlier, detailed analysis of Exon-Florio is beyond the scope of this paper. Another title VII authority worth a passing mention is the one that provides antitrust defenses to private entities conducting joint activities at government request to tackle production and distribution problems that threaten to impair the national defense.¹⁹⁵

Additionally, title VII contains the provision granting immunity from breach of contract actions between private parties where the breach was caused by compliance with a title I government priority order or allocation.¹⁹⁶ This provision has been litigated and will be discussed further in the next section.¹⁹⁷ There is general agreement, however, that it does mean that contractors

¹⁹³ Additional sections of title VII include the following: Public Notice for Rulemaking: Although exempt from the Administrative Procedure Act, 5 U.S.C.S. § 551 – 559 (2001), rules made under the authority of the DPA may be promulgated only when the public is given opportunity to comment. 50 U.S.C.S. app. § 2154 and 2159. The President has the authority to subpoena, or otherwise, investigate any person, place, or document as may be necessary in his discretion to enforce the DPA. *Id.* § 2155(a) and (b). This section repeats the title I possible sanctions of up to \$10,000 or a year in prison or both for violating the DPA. *Id.* § 2155(c). Additionally, this section gives the President authority to keep information obtained in the investigation process confidential unless, in his discretion, withholding would be contrary to the national interest. *Id.* § 2155(d).

¹⁹⁴ *Id.* § 2170 - 2170a.

¹⁹⁵ *Id.* § 2158. Voluntary Agreements for Preparedness Programs and Expansion of Production Capacity and Supply. The government uses this DPA provision to encourage airline industry partnering to tackle the Civil Reserve Air Fleet augmentation of military airlift capabilities in preparation for conditions of national urgency. Telephone Interview with Mr. Larry Hall, Special Assistant to the Deputy Assistant Director of the Readiness Response and Recovery Directorate, Federal Emergency Management Agency (March 17th, 2002). For a description of how a commentator envisioned these agreements in the early 1950s, see George R. Lunn, Jr., *Voluntary Cooperative Action Between Industry and Government Under the Defense Production Act of 1950*, 13 FED. B. J. 35 (1952).

¹⁹⁶ *Id.* at § 2157. Liability for compliance with invalid regulations; discrimination against orders or contracts affected by priorities or allocations.

¹⁹⁷ KaCey Reed, *Casnote: The Supreme Court’s Rejection of Government Indemnification to Agent Orange Manufacturers in Hercules, Inc. v. U.S.: Distinguishing the Forest from the Trees?*, 31 U. RICH. L. REV. 287 (1997); Susan Rousier, *Note and Comment: Hercules v. U.S.: Government Contractors Beware*, 19 WHITTIER L. REV. 215 at 229 (1997).

complying with the letter of the law can not be penalized criminally or sued civilly for breach of contract for circumstances occurring from that compliance.¹⁹⁸

C. Challenges

1. *Constitutionality*

Though an in-depth constitutional analysis of the DPA is beyond the scope of this paper, it seems clear that it is constitutional. This is because the President, acting in accordance with the DPA, acts pursuant to an express authorization of Congress and is supported by the “strongest of presumptions of constitutionality.”¹⁹⁹ Although it might at first blush seem that the “conscription” of a contractor to deliver a product under title I construct is un-American, the courts have not found anything unconstitutional about it.

The constitutional authority of the DPA today and since its inception stem from the War Powers Clause of the Constitution. Article I, Sec. 8 of the Constitution of the United States provides, in relevant part, that “the Congress shall have power to declare war, to raise and support armies, to provide and maintain a navy; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”²⁰⁰

¹⁹⁸ See *infra* Part III. C. 3.

¹⁹⁹ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 at 635 (1952) (Jackson, J. concurring) (holding President Truman’s steel mill seizure without statutory authorization was unconstitutional although it was done during armed conflict for the purpose of preventing disruption of steel supplies to military purposes).

²⁰⁰ U.S. Const. art. I, § 8.

In support of the peacetime legality of the DPA,²⁰¹ the courts have found that the United States need not be at war for Congress and the Executive to possess constitutional sanction to prepare for war.²⁰² Additionally, the courts have stated that the "War power a is broad and comprehensive grant; it is well nigh limitless; it embraces those powers necessary to maintain national defense and security; it is essential to preservation of country as independent nation and perpetuity of liberties."²⁰³ Finally, regarding the Constitutionality of the DPA's priority in contracting section,²⁰⁴ the Court of Appeals for the 5th Federal Circuit stated that "It is not a constitutional infirmity that [the priority contracting provisions of DPA] may result in a loss of, or interference with, private contractual rights."²⁰⁵

2. Controversy – Mixed Reactions to the DPA

The Act is not without critics and controversy. Prior to September 11th, 2001, Senator Phil Gramm of Texas, called for a comprehensive rewrite of the act labeling it as follows:²⁰⁶

²⁰¹ 50 U.S.C.S. app. § 2062(a)(2) (LEXIS 2001) (providing that in peacetime, the health of the industrial and technological base contributes to the technological superiority of the United States defense equipment, which is a cornerstone of the national security strategy, and the efficiency with which defense equipment is developed and produced); See also *Id.* § 2062(a)(4)(providing that continuing international problems justifies some diversion of certain materials and facilities from civilian use to military and related purposes).

²⁰² *United States v. Chester* 144 F.2d 415 (3d Cir. 1944) (finding the Lanham Act condemning property for use in constructing housing for workers engaged in national defense activities Constitutional).

²⁰³ *Porter v. Shibe*, 158 F.2d 68 (10th Cir. 1946) (finding rent control provisions of the Stabilization Act of 1942 constitutional).

²⁰⁴ 50 U.S.C.S. app. § 2071 (LEXIS 2001).

²⁰⁵ *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 995 (5th Cir. 1976) (holding that even a verbal threat of a DPA priority order is enough to invoke the immunity from breach of contract provisions of the DPA found at § 2157).

²⁰⁶ News from the Senate Banking Committee, Senator Phil Gramm, Chairman, GRAMM OUTLINES COMMITTEE AGENDA FOR THE 107TH CONGRESS, at <http://banking.senate.gov/prel01/0122prcf.htm> (last visited Jan. 22, 2002).

We're going to do a comprehensive rewrite of [the Defense Production Act]. [It] is probably the most powerful and potentially dangerous piece of American law. It gives the President extraordinary powers. Richard Nixon imposed wage and price controls under the Defense Production Act. And so we're going to take a long, hard look at both these bills and do a comprehensive rewrite of both.²⁰⁷

He opposed it because he found it to be anti-free market.²⁰⁸ Since September 11th, Senator Gramm has been silent regarding the DPA.²⁰⁹

Even in the clamor of public support surrounding the Gulf War, the DPA was criticized. Stanley Dees, a partner with the prominent Washington D.C. law firm McKenna & Cuneo, complained that

The DPA is an extraordinary power of the United States -You're talking about forcing people to do business with the government whether they want to or not -- to the possible detriment of their relations with their commercial clients. You're talking about taking property ... The government has to be very careful about how they exercise the power because it comes very close to trampling on Fifth Amendment rights.²¹⁰

Notwithstanding this criticism and Senator Gramm's demand for an overhaul, the DPA was reauthorized for a three year period without significant adjustment just following September 11th, 2001.²¹¹

Generally, reaction among industry is favorable.²¹² Indeed, John T. Jones noted that it has been helpful to government contractors in combating price increases by suppliers.²¹³ He reported

²⁰⁷ *Id.* See *Supra* note 16 and accompanying text (noting the President Nixon used the Economic Stabilization Act to institute wage and price controls because such authority has not existed in the DPA since 1953).

²⁰⁸ *Id.*

²⁰⁹ This author requested a statement from his office via telephone and email and received no answer.

²¹⁰ Tom Watson, *Free Hand on the Home Front; Bush Taps Store of Domestic War Powers*, LEGAL TIMES (Feb. 11, 1991). American Lawyer Newspapers Group Inc.

²¹¹ 50 U.S.C.S. app. § 2166 (LEXIS 2001).

that a supplier attempted to dramatically increase the price for software it provided to the government contractor for previous orders. The software was urgently needed to deliver a product provided to the government under a priority rating. There was no economic reason for the price increase. However, the contractor/buyer brought the anti-price gouging provision of the DPA to the supplier's attention and convinced the supplier to reduce its price.²¹⁴ This incident suggests that increased understanding of the DPA will benefit government efficiency.

3. *Litigation*

Some of the critics' gripes have reached the courts and the litigants of the DPA share the fate of litigants of predecessor wartime government contracts legislation -- they lost. A commentator during World War Two put it aptly when he said "The commandeering of private property and the *juggling of contracts* by government during wartime has a long history. The injured parties frequently attempt later to lick their wounds in court, but often to no avail."²¹⁵

Several non-DPA government contracts cases teasingly imply that a compensable taking claim could lie against the government in an *involuntary* business relationship like a DPAS compulsory contract.²¹⁶ Of course, the Kearney and Trecker case laid that issue to rest regarding

²¹² Meyers Interviews.

²¹³ Presentation by John T. Jones, Jr. to the 2001 Contract Law Symposium, Dec. 6, 2001, The Army Judge Advocate General's School, Charlottesville, Virginia. *See supra* note 119.

²¹⁴ No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this act...or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner. 50 U.S.C.S. app. § 2157.

²¹⁵ Frey, *Contractual Problems of War and Peace*, 30 VA. L. REV. 1 (1943).

²¹⁶ *Sun Oil Co., Superior Oil Co. and Marathon Oil Co. v. United States*, 572 F. 2d. 786, 818 (Ct. Cl. 1978) (noting that the concept of a taking as a compensable claim has limited application when rights have been voluntarily created by contract) *Accord* *Hughes Communications Galaxy, Inc. v. United States*, 271 F. 3d 1060, 1069 (Fed. Cir. 2001).

DPAS takings claims.²¹⁷ However, the more the DPAS system is needed and used to prioritize government contracts ahead of commercial contracts, the more litigants there may be. Indeed, the current crisis may increase the number of complainants against the DPAS system, especially if DPAS priorities must be used against non-traditional defense suppliers. It is easy to conceive of pharmaceutical or security equipment companies receiving DPAS orders to address anthrax and airport security requirements. Of course, patriotism will keep some of the frustration in check but at the point that businesses perceive they are missing out on more profitable orders while they are filling DPAS rated orders, there may be increased litigation. For this reason, it behooves the government to use the DPAS sparingly and to use title III to build up industrial capabilities to meet the new threats so that coercive DPAS authority is needed less often.

Another important DPA litigation issue is tort liability. Contractors filling DPAS order should keep the Agent Orange cases²¹⁸ in mind and realize that just because they are giving a government contract priority, they are not automatically indemnified for litigation involving injuries caused by their products.²¹⁹ Accordingly, DPAS participants should bear in mind that the immunity provision is limited to allegations of criminal noncompliance with the DPA and suits for breach of contract by displaced commercial orderers.²²⁰

*4. Relief through PL 85-804 -- Extraordinary Contractual Relief?*²²¹

An article in the Government Contractor and notes on several private law firm web sites recently suggested contractors injured financially by DPA orders might be eligible for

²¹⁷ See *supra* pp. 20-21.

²¹⁸ *Hercules Inc. et. al. v. U.S.*, 516 U.S. 417 (1996).

²¹⁹ See sources cited *supra* note 76.

²²⁰ *Appeal of Elser Elevator Company*, Appeals Case No. 298, VA BCA (LEXIS 1960).

²²¹ 50 U.S.C.S. § 1431-1435 (LEXIS 2001).

compensation through the Extraordinary Contractual Relief law, P.L. 85-804.²²² As discussed above, profit losses due to DPA orders are mostly viewed as non-compensable inconvenience. However, Extraordinary Relief was used to assist the perchlorate rocket fuel manufacturers struggling to increase production in the late 1980s.²²³ Nevertheless, contractors should not be fooled into thinking that Extraordinary Relief money will flow freely just because of inconvenience or lost profit occasioned by a DPAS order. Indeed, There do not appear to be any recorded cases of extraordinary relief being used to correct injuries due to contractors inconvenienced by DPAS orders.²²⁴

However, it is not inconceivable that a substantial hardship could be averted through the use of Extraordinary Relief. Generally, the Extraordinary Relief law allows the President to authorize any agency with national defense responsibility to modify a contract or make advance payments if it would facilitate the national defense without regard to other provisions of law relating to contracts.²²⁵ This discretion is not completely unfettered. The action may not create a “cost-plus-a-percentage-of-cost” contract, or improperly violate laws relating to competition in contracting, profit limits, payment, performance, or bond, or result in a price higher than the lowest rejected responsible bidder’s price in a sealed bid procurement.²²⁶ Additionally, extraordinary relief can

²²² *Operation “Enduring Freedom” Triggers Emergency Contracting Rules*, THE GOVERNMENT CONTRACTOR, 17 Oct. 2001; *DOD Likely to Use Defense Production Act as it Gears Up for War on Terrorists*, Fed. Cont. Rep., Sept, 25, 2001); *Defense Production Act Requirements*, Arnold and Porter Advisory, 28 Sept 01; *The Defense Production Act of 1950*, McKenna & Cuneo Client Alert (Oct. 2, 2001), http://www.mckennacuneo.com/articles/article_detail.cfm?498.

²²³ Linke *supra* note 83, at 44 (noting that P.L. 85-804 authority can be used to expedite payment or authorize advance payment to a contractor in defense emergency conditions).

²²⁴ Telephone Interview with Mr. Carl Vacketta, partner, Piper Marbury, L.L.P. (Feb. 2002) (Mr. Vacketta is the editor of the Extraordinary Contractual Relief Reporter – he opined that 85-804 relief would not be granted for mere lost profits because of a DPA order). But see Linke at 24 (noting that the Air Force used P.L. 85-804 authority to provide \$20,000,000 to the sole producer of a critical rocket material whose business was on the brink of collapse).

²²⁵ 50 U.S.C.S. § 1431 (2002).

²²⁶ 50 U.S.C.S. § 1432 (2002).

not be used to improperly formalize an informal commitment.²²⁷ It is conceivable, however, that a contractor faced with the prospect of losing substantial commercial business because his capacity was consumed by DPAS orders could solicit for advance payments under 85-804 to underwrite a capacity increase. Alternatively, however, the same situation could be solved if title III's loan guarantee provisions²²⁸ could be applied.

IV. Recommendations and Conclusion

The DPA is critically important to the current war effort and to maintaining our long-term national security in the face of new threats. As in the past, the DPA must be studied and used judiciously, deliberately, and synergistically. The DPA was well conceived and is now well refined for these purposes. However, the massive attacks on civilian lives and property that occurred on September 11th require additional emphasis on homeland security measures. Accordingly, the government acquisition community should consider how title III can be used to better protect our critical civilian infrastructure.

With our economic institutions trembling²²⁹ and our military broadly extended, we need to understand and apply the DPA's full range of authority. Title I priority contracting authority gives the government immediate access to the stocked shelves of American industry. Title III industrial base expansion programs can give American industry the means to restock the shelves with tools required for defense and security in the future. The DPA is a proven mechanism. Its array of authorities took us valiantly through fifty staggering years of Cold War defense industrial

²²⁷ *Id.*

²²⁸ 50 U.S.C.S. app. § 2091 (LEXIS 2001) (authorizing loan guarantees).

²²⁹ Cable News Network, *The Return of Rising Profits*, at http://money.cnn.com/2002/03/22/markets/sun_lookahead/index.htm (last visited Mar. 24, 2002) (reporting that American business profits have fallen for the last five quarters).

production. By applying its authorities to this new fight judiciously, the DPA will see us to a more secure future.

The DPA does not require significant modification to take us through the current crisis. It is already a symbiotic construct. Between title I's control authorities and title III's incentive authorities, it encompasses a classic carrot and stick approach to getting what the government needs from industry. With judicious use of both authorities, our industry will respond to the call. We have to be careful to issue only DPAS rated orders that are absolutely necessary so that civilian commerce is not unduly disrupted. Proposed title III programs must be carefully evaluated to selectively incentivize the industries that need a boost. Perhaps we must enhance the industrial base providing chemical weapon antidotes, protective gear, attack resistant construction, or improved security screening equipment for homeland defense as we did with the titanium industry when we needed it for jet aircraft in the 1950s. On the other hand, if the industrial base is able to respond to our security needs without intervention, we should heed the advice of the Congress in 1950 and let the economy respond on its own.²³⁰ In any event, a careful evaluation of the DPA's goals, tools, and past successes will lead to the conclusion that its authority should be applied to the new security paradigm established by the September 11th, 2001 attacks. Careful review will establish that title I authorities should not be changed at all and title III programs should be increased to include industrial base measures that will enhance homeland defense.

This paper illustrates that the DPA's authorities will enable us to respond to the September 11th, 2001 attacks. Indeed, Congress was right on target when it proclaimed "the vitality of the industrial and technology base of the United States is a foundation of national security that provides the industrial and technological capabilities employed to meet national defense

²³⁰ See sources cited *supra* note 3.

requirements, in peace time and in time of national emergency."²³¹ Accordingly, it provided the DPA, as amended, to harness the might of American industry in furtherance of national security. Therefore, the acquisition community must study this law and use its authorities to fight the battle at hand and to prepare for challenges to come. To quote a Todd Beamer, a hero from one of the September 11th hijacked planes who foiled the attackers plan to crash in Washington, D.C., "Let's Roll"²³² and let's fully employ the industrial might of America in the fight for freedom!

²³¹ 50 U.S.C.S. app. § 2062(a)(1).

²³² Nicole Gull, *Paying Tribute to a Hero, "Let's Roll" Rallying Cry is Painted on Jet*, BELLEVILLE NEWS DEMOCRAT, Mar. 23, 2002. Available at <http://www.belleville.com/mld/belleville/2918714.htm>.